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No. 90-998

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH L. DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether statements made to a social worker and a psychologist may be admitted under Mil. R. Evid. 803(4) as statements made for the purpose of medical diagnosis or treatment.

2. Whether the declarant believed that the statements she made were necessary for medical diagnosis or treatment.

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OPINIONS BELOW

The initial opinion of the Air Force Court of Military Review is unreported. The opinion of the court of review on remand (Pet. App. 1a-5a) is reported at 28 M.J. 741. The opinion of the Court of Military Appeals (Pet. App. 6a-23a) is reported at 31 M.J. 196.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 26, 1990. The petition for a writ of certiorari was filed on December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Seymour-Johnson Air Force Base in North Carolina, petitioner, a member of the United States Air Force, was convicted of raping and

sodomizing his daughter, in violation of Articles 120 and 125 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 and 925, respectively. Petitioner was sentenced to confinement for seven years, a dishonorable discharge, and a reduction to the lowest enlisted rank. The Air Force Court of Military Review initially affirmed the findings and the sentence. Before the Court of Military Appeals, petitioner challenged the trial judge's ruling on his objection to the testimony of two government witnesses who related statements of the child-victim. The Court of Military Appeals remanded the case to the court of military review to consider that issue. On remand, the court of military review again affirmed. On discretionary review of the decision on remand, the Court of Military Appeals affirmed.

1. In May 1987, petitioner's wife took their six-year-old daughter to the Duke University Medical Center for evaluation of an obesity problem. Pet. App. 15a. A routine examination of the child by an endocrinologist revealed signs of possible sexual abuse, and the child was referred to the Child Protection Team at the medical center for further evaluation. She was also admitted to the hospital as an inpatient. *Id.* at 7a-8a. Examination of her vaginal area revealed that she had virtually no hymenal tissue remaining, that there was noticeable redness around the vaginal opening, and that there was a clear discharge coming from her vagina. An anal examination also revealed abnormalities. *Id.* at 8a. Nancy Berson, Coordinator of the Child Protection Team, interviewed petitioner's daughter. *Ibid.* Berson spoke with the child briefly on May 12, 1987, to put her at ease, and talked with her in more detail over the next two days. *Id.* at 9a. Berson testified that determining the identity of the abuser is a necessary step in the treatment of child sexual abuse, because therapy will not be effective if the child is returned to an environment that permits continued victimization. *Ibid.*

Early in September 1987, Nancy Miller, a staff psychologist at the Wayne County Mental Health Center, interviewed petitioner's daughter on three occasions. Pet. App. 10a. After evaluating the child, Miller became her therapist. Pet. App. 11a. In the initial interview Miller explained to petitioner's daughter that "I'm here to help you. * * * [T]his is my job * * * my special job. I'm lucky. I get to work with special children like you." *Id.* at 12a. On November 23, 1987, the state district court entered a consent order requiring, among other things, that petitioner's daughter continue in therapy at the Wayne County Mental Health Center. *Id.* at 13a-14a.

2. At trial, petitioner's wife testified that she took her daughter to Duke University for evaluation of her weight problem, not for an evaluation of possible sexual abuse. Tr. 142-143, 150. Petitioner's wife said that she had not taken her daughter to the Wayne County Mental Health Center at her own choosing, but had done so at the urging of the attorney who had been appointed for her and her daughter. Pet. App. 15a; Tr. 144-145. Nonetheless, she told her daughter that the therapist, Miller, was there to help her, and she encouraged her daughter to speak openly and honestly. Tr. 145-146. Petitioner's wife testified that her daughter had been hospitalized prior to her admission to the Duke University Medical Center, and she was certain that her daughter understood that she was in a hospital. Pet. App. 15a; Tr. 147.

The prosecution sought to admit the statements that petitioner's daughter made to Berson and Miller under Mil. R. Evid. 803(4), which exempts from the hearsay rule any statement made for purposes of medical diagnosis or treatment. In ruling on petitioner's objection, the trial judge stated, "I find that in both interviews with Ms. Berson and Ms. Miller, that [petitioner's daughter's] state of mind was that these sessions were set up to help her." Pet. App. 16a; Tr.

161. The trial judge also found that the information elicited from petitioner's daughter by Berson and Miller was "not only * * * reasonably pertinent, but [was] actually required for effective treatment." Pet. App. 17a; Tr. 162. Accordingly, the trial judge overruled petitioner's objection.[1]

3. The Air Force Court of Military Review found that petitioner's daughter knew that her statements to Berson and Miller were part of her medical diagnosis or treatment. Pet. App. 3a-4a. The court also found that petitioner's daughter expected to receive medical benefits from her stay at the Duke University Medical Center and her visits to the Wayne County Mental Health Clinic. *Ibid.*[2]

4. The Court of Military Appeals affirmed. Pet. App. 6a-23a. After conducting an extensive review of the evidence at trial, the Court of Military Appeals upheld the trial court's ruling. *Id.* at 21a-23a.[3]

ARGUMENT

1. Petitioner maintains that his daughter's statements to her therapists were inadmissible under Mil. R. Evid. 803(4) as statements made for the purpose of medical

[1] The prosecution and the defense both elected not to call petitioner's daughter as a witness at trial. Pet. App. 20a. In support of the charges, the prosecution presented extensive medical evidence, as well as the statements that petitioner's daughter made to Berson and Miller. Petitioner, his wife, and petitioner's other two daughters testified for the defense. Petitioner also presented evidence of his good character and called an expert witness. In addition, petitioner played a videotape of an interview of his daughter conducted by a social worker, which, petitioner argued, showed that the idea of sexual abuse had been implanted in his daughter's mind by suggestive questioning. Pet. App. 17a-18a.

[2] Courts of military review have independent fact-finding authority under Article 66(c) of the UCMJ, 10 U.S.C. 866(c).

[3] The Court of Military Appeals noted that any error in the admission of the statements made by petitioner's daughter to Miller was harmless in light of the other evidence presented at trial. Pet. App. 22a.

diagnosis or treatment, because neither Berson nor Miller was a physician or a psychologist with a Ph.D. That claim does not warrant review by this Court, for several reasons.

To begin with, petitioner has not properly preserved his claim. Petitioner did not object at trial to the testimony of Berson and Miller on the ground that they lacked advanced degrees in medicine or psychology. See Tr. 155-160. Petitioner therefore cannot prevail unless he can show that the admission of their testimony was plain error. Mil. R. Evid. 103(a) and (d). For the reasons given below, petitioner cannot make that showing. Moreover, petitioner did not raise that claim in the court of military review or in the Court of Military Appeals. Accordingly, petitioner has waived his claim. See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).

In any event, petitioner's argument finds no support in the text of Mil. R. Evid. 803(4), the "medical treatment" exception to the hearsay rule.[4] Rule 803(4) addresses the motive of the declarant and the subject matter of the statement, but it imposes no limitation on the identity of the person to whom the declarant's statements may be made. In particular, the Rule does not require that a statement be made to a physician to qualify for admission. As one treatise explains, "[b]ecause the declarant's motive to pro-

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[4] Mil R. Evid. 803(4) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * *
>
> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

mote treatment or diagnosis is the factor crucial to reliability, Rule 803(4) does no require the statement to be made to a physician." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* para. 803(4)[01], at 803-144 to 803-145 (1990).

The Advisory Committee on the Federal Rules of Evidence clearly rejected any such limitation on the persons who could recount a declarant's out-of-court statements under Fed. R. Evid. 803(4), which is identical to and served as the model for Mil. R. Evid. 803(4). The Advisory Committee wrote that "the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Notes of Advisory Committee on Proposed Rules, 28 U.S.C. at 779. Nor have the courts imposed any such limitation on the scope of Fed. R. Evid. 803(4). They have ruled that statements to social workers and nurses can be admitted under the Rule as statements made for the purpose of medical diagnosis or treatment. *Navarro De Cosmo* v. *Hospital Pavia*, No. 89-2020 (1st Cir. Jan. 11, 1991), slip op. 14-15 (records of hospital social worker); *United States* v. *DeNoyer*, 811 F.2d 436, 438 (8th Cir. 1987) (statements made to social workers). See *State* v. *Smith*, 315 N.C. 76, 83-84, 337 S.E.2d 833, 839 (1985) (statements made by the victim of child abuse to her grandmother admissible under state rule of evidence identical to Fed. R. Evid. 803(4)); *Goldade* v. *State*, 674 P.2d 721, 723-727 (Wyo. 1983) (statement to emergency room nurse admissible under state rule of evidence identical to Fed. R. Evid. 803(4)), cert. denied, 467 U.S. 1253 (1984).

Petitioner's submission is also inconsistent with the rationale underlying Rule 803(4). Statements made for the purpose of medical diagnosis or treatment are admissible because they have a very high degree of reliability due to the fact that a person seeking medical treatment has a strong motive to speak truthfully and accurately since the treat-

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ment or diagnosis will rest on the information she conveys. *United States* v. *Renville*, 779 F.2d 430, 436 (8th Cir. 1985); *United States* v. *Deland*, 22 M.J. 70, 72-73 (C.M.A.), cert. denied, 479 U.S. 856 (1986); 4 J. Weinstein & M. Berger, *supra*, para. 803(4)[01]. The exact medical credentials of the listener, accordingly, should not be dispositive if the declarant believes that the listener can offer her medical assistance and the statements are reasonably related to her diagnosis or treatment. See *Morgan* v. *Foretich*, 846 F.2d 941, 949 (4th Cir. 1988); *United States* v. *Renville*, 779 F.2d at 436; *United States* v. *Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981) (all adopting the foregoing two-part test, which also was applied by the courts below in this case, see Pet. App. 2a, 21a-22a).[5]

Finally, Berson and Miller were experienced in the diagnosis and treatment of child abuse. Berson was the Coordinator of the Duke Child Protection Team and the principal interviewer of children who were suspected victims of child abuse. Tr. 96-97. She had interviewed approximately 450-500 children to determine whether they had been victims of child sexual abuse. Pet. App. 8a; Tr. 97-98. Miller had a masters degree in psychology; she was licensed by the State of North Carolina as a Psychologist Associate; and

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[5] Petitioner refers in passing, see Pet. 10-11, to several decisions resolving issues under the Confrontation Clause of the Sixth Amendment, such as *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990), and *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Those cases are inapposite, however, because petitioner does not raise a Confrontation Clause claim in this Court and did not raise any such claim in the lower courts. As the Court of Military Appeals pointed out: "The defense at no point invoked the Confrontation Clause, and it did not specifically claim that the prosecution must establish unavailability to testify. If the defense had wished to make an issue of [petitioner's daughter's] availability, it had several opportunities—and at least one invitation—to do so." Pet. App. 19a-20a.

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she was the staff psychologist at the Wayne County Mental Health Center, where she was responsible for interviewing children who were suspected victims of abuse. Tr. 113, 115-116, 123.

2. Petitioner also argues that his daughter did not believe that the statements she made to Berson and Miller were necessary for medical diagnosis or treatment. Pet. 12-14. That fact-bound claim does not warrant review by this Court.

The record shows that petitioner's daughter knew that she was receiving medical attention and that she should speak openly and honestly. Mrs. Dean initially took her daughter to the Duke Medical Center to have her weight problem examined. Mrs. Dean told her daughter to cooperate with the doctors at the Center, and the child understood her mother. Mrs. Dean testified that her daughter had previously been to a hospital and knew that she was in a hospital again. Pet. App. 3a. Berson explained to petitioner's daughter that she was "a lady who talked to kids in the hospital when we were concerned that things might be bothering them or worrying them." *Ibid.* Miller made a similar statement to petitioner's daughter, telling the child that her job was "to [help] special children." *Ibid.* Mrs. Dean told petitioner's daughter that Miller "was there to help [her]," and encouraged the child to "tell the truth" during her sessions with Miller. Pet. App. 15a. Finally, petitioner's daughter knew why she was meeting with Miller, asking at one point if what had happened to her "happen[ed] * * * to [other] children too," including "boys." Pet. App. 11a; Tr. 114.

Petitioner's daughter therefore knew that she was in a setting where she could expect medical treatment, that Miller and Berson were there to help her, that she should speak the truth, and that she had some type of problem. Under these circumstances, the trial judge, the court of military review, and the Court of Military Appeals all correctly

found that petitioner's daughter had the requisite state of mind to satisfy Mil. R. Evid. 803(4). See Pet. App. 3a, 16a, 21a-22a. Petitioner's claim that his daughter "had no expectation of receiving medical benefit," Pet. 12, is nothing more than a disagreement with a fact that has been resolved against him three times at this point. Those concurrent findings by the courts below do not warrant further review by this Court. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

Petitioner attempts to dismiss this evidence because his daughter did not independently seek medical treatment for sexual abuse. Pet. 12. Rule 803(4) contains no such requirement, however, and the courts have properly been reluctant to impose one because they have recognized that "young children cannot independently seek out medical attention, but must rely on their caretakers to do so." *State* v. *Smith*, 315 N.C. at 84, 337 S.E.2d at 840. It is also unconvincing to maintain that petitioner's daughter's statements were unreliable because Mrs. Dean initially took her daughter to the hospital for a weight problem. A five-year-old child would be unaware of the cause of her weight problem, and would be likely to answer all medical questions with the same degree of honesty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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